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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD B. KAY,

Petitioner,

v.

BREMER EHRLER AND THE KENTUCKY BOARD OF ELECTIONS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN URGING REVERSAL

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BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN URGING REVERSAL

INTERESTS OF *AMICUS*

This brief is filed, with the consent of the parties, on behalf of Public Citizen, a nationwide consumer advocacy organization with over 95,000 members. With the support of its membership, Public Citizen has promoted the enactment, and the vigorous use and enforcement, of federal laws providing for consumer protection, health and safety in the workplace, environmental protection, civil rights, and open government. Many of these laws entitle the prevailing litigant to an award of attorney's fees against the government or other party found to have violated their substantive provisions. Such fee-shifting encourages the vindication of important federal rights, which in some cases, such as this one, are successfully prosecuted *pro se* by a member of the bar. Public Citizen is concerned about the ruling below and its potential for discouraging liti-

gation of important public issues because it enables a losing party to gain a windfall and avoid paying attorney's fees under 42 U.S.C. § 1988 solely because the action was brought by an attorney who represented himself.

Moreover, because Public Citizen, through its staff of in-house attorneys, frequently represents itself in litigation, its interest in receiving fee awards may also be jeopardized by the ruling below. Thus, if the issue in this case is stated more broadly — whether a prevailing party appearing *pro se* may be awarded attorney's fees under federal fee-shifting statutes — Public Citizen's ability to obtain attorney's fees when it uses in-house attorneys to represent itself is called into question. Accordingly, Public Citizen is filing this brief to highlight a perspective that might not otherwise be presented by the parties.

STATEMENT OF THE CASE

The facts giving rise to this dispute are simple and uncontested. In August 1987, petitioner Richard Kay announced that he would run for President of the United States. He wrote to the Kentucky Secretary of State, requesting that his name be presented to respondent Kentucky Board of Elections ("the Board") for placement on the primary ballot. Kay also paid a $1,000 "deposit" to the Board pursuant to Ky. Rev. Stat. §118.611, which would be refunded only if Kay polled more than 3% of the total vote cast in his party's primary election, but would otherwise escheat to the Commonwealth. Petitioner's Appendix to Petition for Writ of Certiorari ("Pet. App.") at 23a-24a.

Kay was well aware that his proposed candidacy might be rejected. He had previously sought the Presidency in 1980 and had asked that his name be placed on the Kentucky primary ballot, but was refused by the Board pursuant to Ky. Rev.

Stat. §118.580 (repealed in 1982), which limited ballot access to "all . . . generally advocated and nationally recognized" candidates. Kay brought suit *pro se* at that time, and the court declared Ky. Rev. Stat. §118.580 unconstitutional on vagueness grounds and ordered that Kay's name be placed on the ballot. *Kay v. Mills*, 490 F.Supp. 844, 850 (E.D. Ky. 1980). He did not seek attorney's fees. Shortly after the decision in *Kay v. Mills*, the offending statute was repealed, but in 1986 the Kentucky Legislature enacted an identically worded statute, Ky. Rev. Stat. §118.581.

On January 11, 1988, Kay was notified that, because he was not a "nationally recognized" candidate, his name would not appear on the ballot. Pet. App. 20a. The next day, Kay once again filed suit *pro se* under 42 U.S.C. § 1983, asking that respondents be preliminarily enjoined to place his name on the primary ballot. He added a claim that his candidate's deposit under Ky. Rev. Stat. §118.611 be refunded, and he asked that both Ky. Rev. Stat. §118.581 and Ky. Rev. Stat §118.611 be declared unconstitutional. On January 13, 1988, having determined that Kay was the same person who had successfully challenged Kentucky's primary election law in 1980, respondents placed Kay's name on the ballot. Pet. App. 20.

The parties thereafter cross-moved for summary judgment on the remaining claims. The district court referred the case to a magistrate, who recommended that Ky. Rev. Stat. § 118.581 be declared unconstitutional, relying on the district court's prior decision in *Kay v. Mills, supra*. In addition, the magistrate recommended that the candidate's deposit statute be declared unconstitutional under the due process and equal protection clauses because it "impose[d] fees only on minority candidates." Pet. App. 20a-24a. With respect to the attorney's fees issue, the magistrate urged that fees be denied on the basis of the Sixth Circuit's decision in *Falcone v. I.R.S.*, 714 F.2d 646 (1983), *cert. denied*, 466 U.S. 908 (1984), which held

that an attorney proceeding *pro se* is not entitled to fees under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The district court reviewed the magistrate's recommendations *de novo* and concurred in all respects, including the denial of attorney's fees. Pet. App. 12a-17a.

The case was appealed on the issue of attorney's fees alone, and the Sixth Circuit affirmed, in a split decision. The court of appeals recognized the division among the circuits on the issue of whether an attorney proceeding *pro se* is entitled to fees under § 1988, and under the FOIA as well, but believed that it was required by its prior decision in *Falcone*, *supra*, to deny such an award under § 1988. Judge Jones dissented, indicating that Kay was entitled to fees, notwithstanding *Falcone*, based on what he perceived as differences between the underlying purposes of the FOIA's fee-shifting provision and those expressed in § 1988. Pet. App. 9a-11a.

ARGUMENT

THE DECISION BELOW SHOULD BE REVERSED

The narrow question presented by this case — whether a defendant can avoid liability for attorney's fees under 42 U.S.C. § 1988 simply because the prevailing plaintiff was an attorney who represented himself in the litigation — is an important one. Indeed, the facts of this case illustrate that attorneys proceeding *pro se* can, and do, vindicate important constitutional and statutory rights. Petitioner Richard Kay established not only his own right not to be excluded from Kentucky's presidential primary on the basis of an unconstitutionally vague statute, but also assured that future minority candidates will have lawful access to the ballot and voters will have a broader choice of candidates to consider. Pet. App. 21a. Moreover, Kay's litigation efforts have secured the rights of all potential candidates not to be subjected to Kentucky's discriminatory

deposit statute, which amounted to a $1,000 penalty solely on minority candidates.

Similar rights were vindicated in the leading *pro se* attorney's fees case of *Duncan v. Poythress*, 777 F.2d 1508 (11th Cir. 1985)(*en banc*), *cert. denied sub nom.*, *Poythress v. Kessler*, 475 U.S. 1129 (1986), where an attorney secured the constitutional rights of all Georgia voters by obtaining an order directing state officials to call a special election for the state Supreme Court. *See also Shakman v. Democratic Organization of Cook County*, 634 F. Supp. 895, 901 (N.D. Ill. 1986) (*pro se* attorney awarded fees under § 1988 in case involving conspiracy to deprive plantiffs of their constitutional rights to a fair political and electoral process); *Rybicki v. State Board of Elections*, 584 F. Supp. 849 (N.D. Ill. 1984)(three-judge district court) (action brought by *pro se* attorney setting aside statewide legislative redistricting plan).

In light of their specialized training and sensitivity to the rule of law, it is not surprising that it is often lawyers who "search for violations of constitutional and statutory rights and then seek to vindicate those rights. . . ." *Duncan*, 777 F.2d at 1515. Because such litigation is fully consistent with the language and purpose of § 1988 and other fee-shifting statutes, *id.*, it would be anomalous to deny fees to plaintiff-attorneys who represent themselves. Indeed, as argued more fully in petitioner's brief, it would produce an even bigger windfall to losing parties than would the award of reduced hourly rates based on costs alone, a construction of § 1988 which this Court unanimously rejected in *Blum v. Stenson*, 465 U.S. 886 (1984).

The Sixth Circuit relied on its prior decision in *Falcone*, *supra*, interpreting the FOIA, to deny petitioner fees on the ground that § 1988's " 'plain language,' " " assumes a pay-

ing relationship between an attorney and a client." Pet. App. 8a, *quoting Falcone*, 714 F.2d at 648. The court of appeals erred in this respect since neither § 1988 nor any other major fee-shifting statute explicitly requires an attorney-client relationship, let alone a fee-paying one. *See Blum, supra* (work of legal services attorneys, who receive no payment from their clients, fully compensable under § 1988). More importantly, from *amicus'* perspective, if such a relationship is indeed critical to an award of fees, which we think extremely implausible, then the Sixth Circuit's decision casts doubt on the eligibility for fees of organizational plaintiffs, such as businesses, public interest organizations, and local governmental units, which regularly proceed *pro se* to vindicate federal constitutional and statutory rights. If, as we now show, it would be contrary to Congressional intent and sound public policy to deny fees to organizations proceeding *pro se*, there is no reason to deny them to individual attorneys who represent themselves.

To deny organizational plaintiffs fees when their in-house counsel represents them would penalize those organizations for the efficient use of their resources and undermine Congress' design, not only with respect to the scope of its fee-shifting provisions, but as to the full achievement of the goals of its substantive enactments as well. While our concerns apply to all legislation providing for an award of attorney's fees, Congressional efforts in three areas — environmental protection, the Equal Access to Justice Act, and the FOIA — underscore our position that organizations proceeding *pro se* and, logically therefore, all *pro se* attorneys, are eligible for statutory fee awards.[1]

Nearly all of the significant federal environmental legislation

[1]Because petitioner's brief fully addresses the legislative history under § 1988 endorsing the award of fees to *pro se* organizations, we do not discuss it here. *See* H.R. Rep. No. 1558, 94th Cong. 2d Sess. 8 n.16 (1976).

allows the court to award attorney's fees to the prevailing party in litigation. *See, e.g.*, 16 U.S.C. § 1540(g)(4)(attorney's fees in citizen suits to enforce Endangered Species Act); 33 U.S.C. § 1365(d)(Federal Water Pollution Control Act); 42 U.S.C. § 7604(d)(Clean Air Act); 43 U.S.C. § 1349(a)(5)(Outer Continental Shelf Lands Act). The legislative histories of these enactments illustrate Congress' understanding that organizations dedicated to environmental conservation would be at the forefront in enforcing such legislation. *See, e.g.*, S. Rep. No. 414, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3745, 3747 (recognizing that "groups" are among those persons who will bring suit to enforce Water Pollution Control Act, and because, in doing so, such litigants are "performing a public service," the court should "award costs of litigation to such party"); H.R. Rep. No. 590, 95th Cong., 2d Sess. 161, *reprinted in* 1978 U.S. Code Cong. & Admin. News 1567 (citizen suits under Outer Continental Shelf Lands Act may be brought by anyone who can show an actual interest in the litigation, including entities that meet the requirements for organizational standing under *Sierra Club v. Morton*, 405 U.S. 727 (1972)).

Because Congress has enacted broad citizen suit provisions for the enforcement of its environmental laws, and has indicated that public interest organizations would play an important enforcement role, it would do extreme violence to Congress' purpose in enacting both the citizen suit provisions and their fee-shifting components, to deny such organizations attorney's fees simply because they represent themselves.[2] It

[2]It is common knowledge that the major environmental organizations such as the Sierra Club, the National Resources Defense Council, the Wilderness Society, and the Environmental Defense Fund, are, in large part, public interest law firms which represent themselves in litigation. Indeed, the vast majority of reported decisions under the federal environmental laws have been litigated, at least in part, by one of these organizations.

is thus not surprising that there is a large body of case law that routinely, and without discussion of the *pro se* character of the representation, awards attorney's fees to environmental organizations for the work of their in-house counsel. *See, e.g.*, *Sierra Club v. EPA*, 769 F.2d 796, 808-09 (D.C. Cir. 1985); *Environmental Defense Fund, Inc. v. EPA*, 672 F.2d 42, 50-51 (D.C. Cir. 1982); *Conservation Law Foundation of New England v. Watt*, 654 F. Supp. 706 (D. Mass. 1984); *National Trust For Historic Preservation v. Corps of Engineers*, 570 F. Supp. 465, 472 (S.D. Ohio 1983) (with respect to attorney's fee rates, "the law is clear that institutional attorneys are to be treated no differently than private attorneys"). Indeed, so strong is the presumption that public interest groups will be the prime enforcers of our environmental protection legislation, that the federal government has argued, albeit unsuccessfully, that *only* such "watchdog groups" are entitled to fee awards. *Florida Power & Light Co. v. Costle*, 683 F.2d 941, 942-43 (5th Cir. Unit B 1982); *see also Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 5 (D.C. Cir. 1982)(awarding fees to in-house counsel for the District of Columbia Government).

In only two cases have courts addressed the issue of eligibility for attorney's fees of an organization proceeding *pro se*, both in the environmental law context. In *Natural Resources Defense Council v. EPA*, 484 F.2d 1331 (1st Cir. 1973), the court considered the government's amorphous contention that a public interest organization " 'formed for the purpose of litigating against the government' . . . should be denied attorneys' fees." *Id.* at 1338 n.7. Relying on Congress' recognition that "public interest organizations would conduct a great deal of litigation" under the Clean Air Act, the court dismissed the argument summarily: "If Congress desired to use the award of fees to encourage meritorious litigation and to discourage frivolous suit, the identity of the party, and the source of its counsel, would be of little moment." *Id.*

In *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 762 F.2d 272 (3rd Cir. 1985), *affirmed in part and reversed in part on other grounds*, 478 U.S. 546 (1986), the Third Circuit responded to the government's argument — illustrative of the concerns expressed by *amicus* herein — that decisions holding *pro se*, *non*-lawyers ineligible for attorney's fees require that organizations represented by in-house counsel also be denied fees. The court rejected that position, noting that it "conflicts significantly with the purposes of the citizen suit provisions of the Clean Air Act." *Id.* at 278. Moreover, the court indicated that such a rule would be inefficient, "forcing the use of more expensive outside counsel, creat[ing] a disincentive for any public interest or citizens group contemplating the institution of litigation to benefit the environment." *Id.* Of course, the same rationale applies to *pro se* individual attorneys, such as Kay, who, in order to be eligible for fees, would first need to assess the facts before deciding whether litigation is appropriate, then confer with at least one other lawyer, enter into a fee arrangement with the lawyer who ultimately decided to take the case, and then, throughout the litigation, spend time conferring with that lawyer. Such additional use of resources would serve no purpose where, as here, the plaintiff is already a licensed attorney. *See Duncan*, 777 F.2d at 1613-15.

The Equal Access to Justice Act ("EAJA") also provides for an award of fees to certain private parties in litigation against the federal government where the government's position in the litigation or its underlying administrative conduct was not "substantially justified." 28 U.S.C. § 2412(d).[3] Fees may be awarded to individuals whose net worth does not exceed $2

[3]The EAJA was originally enacted for a three year period in 1980 (effective October 1, 1981), and was made permanent in 1985. *See* P.L. 96-481, 96 Stat. 2325; P.L. 99-80, 99 Stat. 183.

million and to organizations with a net worth of not more than $7 million. The legislative history from both the original enactment in 1980 and the reenactment in 1985 make abundantly clear that the primary purpose of the legislation was to aid small businesses in their disputes with the federal government and to provide them with an incentive to challenge onerous governmental action. *See, e.g.*, H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4991; S. Rep. No. 253, 96th Cong., 1st Sess. 5 (1979) (EAJA was a response to "evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue"); H.R. Rep. No. 120, 99th Cong., 1st Sess. 8 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 136 ("The legislation is a high priority for the small business community"). In addition, nearly every Member of Congress who spoke during the floor debate on the legislation noted the importance of the EAJA to small businesses facing oppressive and capricious governmental conduct. *See generally* 131 Cong. Rec. S9991-98 (daily ed. July 24, 1985); 131 Cong. Rec. H4760-64 (daily ed. June 14, 1985). *See also* 21 Weekly Comp. of Pres. Doc. 966-67 (August 5, 1985)(statement of the President approving "this important program that helps small businesses . . . fight faulty government actions . . .").

Small businesses often employ in-house counsel who litigate, or assist in litigating, their disputes. It thus would defy reason, given Congress' purpose in enacting the EAJA, that small businesses should either forego fees for work done by their in-house counsel, on the ground that the organization is proceeding *pro se*, or be forced to pay outside counsel, so that an EAJA award would be available if the government's position proves to be insubstantial. Indeed, compelling such a Hobson's choice would be particularly damaging to Congressional intent in the EAJA context, which limits fees to $75 per hour,

adjusted for inflation, even where the market rate exceeds that figure. 28 U.S.C. § 2412(d)(2)(A); *see Pierce v. Underwood*, 487 U.S. 552, 571-72 (1988). The choice is thus between using in-house counsel at cost, but without any hope of an EAJA award, or, in order to preserve the possibility of such an award, using more expensive outside counsel whose market rate is not fully compensable under the EAJA.[4]

However, the rationale employed by the Sixth Circuit to deny Kay fees would apply fully if the fee applicant were an attorney who was the sole owner and employee of a small business and had prevailed in litigation with the federal government. But to deny the applicant fees under the EAJA on the basis of his or her *pro se* status in that dispute would run counter to Congress' desire to place private citizens and small businesses on a more equal footing with the federal government when challenging governmental action. H. Rep. No. 120, *supra*, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132-33; *see Jones v. Lujan*, 883 F.2d 1031, 1035 (D.C. Cir. 1989) (awarding fees to *pro se* attorney and noting that the EAJA "in no way rules out an attorney legitimately representing himself").

Finally, it is useful to consider the FOIA, which allows an award of attorney's fees to plaintiffs who have substantially prevailed in their efforts to obtain the release of records from the federal government. *See* 5 U.S.C. § 552(a)(4)(E). Although, as petitioner has indicated, *see* Petition at 9, there is a split among the circuits as to whether fees should be awarded to prevailing *pro se* FOIA plaintiffs who are licensed attorneys, the reasons to allow such awards are compelling.

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[4]The EAJA also allows fees to a unit of local government with a net worth not exceeding $7 million. 28 U.S.C. § 2412(d)(2)(B). Small towns and counties also often employ attorneys which allows those entities, at least in part, to proceed *pro se* in litigation.

The relatively large volume of FOIA cases successfully litigated by *pro se* attorneys indicates that those attorneys have been particularly vigilant in demanding that the government release records which, by law, may not be kept from public scrutiny. *See, e.g., Falcone*, 714 F.2d 646; *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051 (5th Cir. 1983); *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977). To force such plaintiffs either to relinquish their opportunity for a fee altogether, or to inefficiently litigate the case through another attorney, would substantially frustrate the purposes of open government undergirding the Act.

Amicus Public Citizen regularly litigates under the FOIA in order to obtain and publicly disseminate information about governmental operations, public health and safety, and other vital matters that would otherwise remain behind closed doors. Although *amicus* uses its own attorneys to represent itself in such litigation, it would not have to do so if it meant jeopardizing the possibility for attorney's fees because it could generally substitute an individual staff member willing to prosecute the action in his or her name, thereby making the representation no longer *pro se*. However, to engage in such machinations would also be inefficient and, more fundamentally, serve no purpose under the FOIA or its fee-shifting provision.

This discussion also has applicability to petitioner's situation. Kay could have formed a non-profit membership corporation named "Kay for President" and, presumably, brought the action in the organization's name, with Kay as counsel. So long as he was not a member or employee of that organization, neither Kay nor the organization would be proceeding *pro se*. Thus, he could have achieved the same results as he did in this litigation, set important constitutional precedent, and, consistent with the rationale of the court below, been

awarded a fee under § 1988. This scenario points out the peril of deciding the question presented by going beyond the language and purposes of § 1988 — which seeks to encourage the use of lawyers to bring cases affecting important constitutional and statutory rights — to avoid imagined concerns, such as the creation of a so-called "cottage industry" of underemployed lawyers, Pet. App. 7a, which find no expression in Congress' explicit mandate or its legislative history. *See* S. Rep. 1011, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5910 (purpose of § 1988 is to encourage vindication of civil rights); *see also Duncan*, 777 F.2d at 1515 (rebutting "cottage industry" argument). Prevailing *pro se* litigants, whether appearing as individual attorneys or organizationally through in-house counsel, have ably served the purposes of § 1988, and they should not be denied an award of fees solely on the basis of their *pro se* status.

CONCLUSION

For the reasons stated above, the decision of the Sixth Circuit should be reversed.

Respectfully submitted,

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